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## THE COMPETENCY, AS WITNESSES, OF HUSBAND AND WIFE.

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I. THE COMMON-LAW RULE EXCLUDING THEM.—The rule of the common law excluding parties from the witness-box also excluded the husband or wife of a party, as a witness for or against the party: Co. Litt. 6 b; Gilb. Ev. 119; Bull. N. P. 286. Where the husband was a party, the wife could not testify: *Weikel* v. *Probasco*, 7 Ind. 690; *Manchester* v. *Manchester*, 24 Vt. 649; *Kelley* v. *Proctor*, 41 N. H. 139; nor could she where the husband was disqualified by reason of interest in the event: *Pryor* v. *Ryburn*, 16 Ark. 671; *Smead* v. *Williamson*, 16 B. Mon. (Ky.) 492; *Griffin* v. *Brown*, 2 Pick. (Mass.) 304; *Larrabee* v. *Wood*, 54 Vt. 452; so, also, the wife being a party, the husband was incompetent: *Higdon* v. *Higdon*, 6 J. J. Marsh. (Ky.) 48; *Cull* v. *Herwig*, 18 La. Ann. 315; *Stewart* v. *Stewart*, 7 Johns. Ch. (N. Y.) 229; *Obstorn* v. *Black*, Spear's Ch. (S. C.) 431.

This rule was founded partly on their identity of interest, and partly on a principle of public policy lying at the basis of civil society, which was intended to guard the security and confidence of private life, and prevent discords in families, even at the risk of an occasional failure of justice: *O'Connor* v. *Majoribanks*, 4 M. & G. 443; *Stein* v. *Bowman*, 13 Pet. (U. S.) 223; *Davis* v. *Dinwoody*, 4 T. R. 678; *Bentley* v. *Cooke*, 3 Doug. 422. The rule was an inflexible one, and from it no evasion was permitted: *Kemp* v. *Downham*, 5 Harr. (Del.) 417; *Waddams* v. *Humphrey*, 22 Ill. 661; *Bradford* v. *Williams*, 2 Md. Ch. 1; *Kimbrough* v. *Mitchell*, 1 Head (Tenn.) 539. And see *Peaslee* v. *McLoon*, 16 Gray (Mass.) 488, where the English cases are reviewed. This common-law rule also prevailed in equity: *Vowles* v. *Young*, 13 Ves. 144, and even the death of one of the parties to the marriage (*infra*, XI., XII.), or its dissolution by divorce or judicial annulment did not operate to relax it: *infra*, XIII.

II. SCOPE AND EXTENT OF THE RULE.—The rule was applied to exclude the wife where, though not the nominal party, the husband was the beneficial plaintiff in the suit: *Pyle* v. *Maulding*, 7 J. J. Marsh. (Ky.) 202; *Farrell* v. *Ledwell*, 21 Wis. 182; *Joice* v. *Branson*, 73 Mo. 28. If his interests were directly involved so as to be concluded by any verdict or judgment in the case, she could not testify: *Young* v. *Gilman*, 46 N. H. 484; *Pringle* v. *Pringle*, 59 Penn. St. 281; *Larrabee* v. *Wood*, 54 Vt. 452; *Lewis* v. *McDougall*, 17 Wis. 517. Direct interest of either spouse, in the result of the litigation, totally disqualified the other as a witness:

*Wheeler* v. *Wheeler*, 47 Vt. 637; *Bierly's Estate*, 81* Penn. St. 419. So, though the husband was not a party, the wife could not testify to any matter for which he might be indicted: *Den* v. *Johnson*, 3 Harr. (N. J.) 87; and the wife of one of two or more co-defendants was an incompetent witness, either for or against the other defendants who joined with her husband in the defence: 1 Hale P. C. 301; *Rex* v. *Hood*, 1 Moo. C. C. 281; *Tomlinson* v. *Lynch*, 32 Mo. 160; *Craig* v. *Kittredge*, 20 N. H. 169; even after her husband had suffered a default to be taken against him: *Sparhawk* v. *Buell*, 9 Vt. 41.

In applying these principles, it has been held that a witness whose wife had funds invested in the business of the plaintiff copartnership was incompetent as a witness: *Jackson* v. *Miller*, 1 Dutch. (N. J.) 90; as was a witness whose wife was a stockholder in the bank which brought the suit: *Routh* v. *Agricultural Bank*, 12 Sm. & M. (Miss.) 161; and another, the trustee of his wife's property being a party, was not permitted to testify for the trustee, although he had no interest in the subject-matter of the trust: *Burrell* v. *Bull*, 3 Sandf. Ch. (N. Y.) 15; *Hasbrouck* v. *Vandervoort*, 9 N. Y. 153. So, the husband was not permitted to testify in support of a nuncupative will claimed to have been made in favor of his wife: *Jones* v. *Norton*, 10 Tex. 120; or to prove a marriage contract in her favor: *McDuffie* v. *Greenway*, 24 Tex. 625.

The wife of a special bail was incompetent for the principal defendant: *Leggett* v. *Boyd*, 3 Wend. (N. Y.) 376. She could not prove the fact of her husband's bankruptcy: *Ex parte James*, 1 P. Wms. 610, 611. And neither could testify, in a proceeding to which they were parties, to enforce a mechanic's lien against their property: *Briggs* v. *Titus*, 7 R. I. 441.

But this common-law rule has been greatly relaxed in many jurisdictions, and almost totally abrogated in others. The various statutory provisions effect quite different results in the several states, some of them placing the admissibility of the testimony of husband and wife upon the same plane as that of persons in no way related one to another (except as to confidential communications between them), and others only partially, and with more hesitancy obliterating the safeguards built up around the marriage relation by the common law. In one respect, however, there seems to be considerable unanimity among the decisions interpreting the so-called "enabling acts," that is, it is pretty well settled by the weight of

authority, that the removal, by these statutes, of the disqualification of interest in the event, as a party or otherwise, does not remove the common-law inhibition as to the testimony of husband or wife for or against the other, the common-law rule not being founded upon the interest of the witness, but upon grounds of public policy: *Lucas* v. *Prooks*, 18 Wall. (U. S.) 436; *Dawley* v. *Ayers*, 23 Cal. 108; *Stanley* v. *Stanton*, 36 Ind. 445; *McKeen* v. *Frost*, 46 Me. 239; *Kelley* v. *Drew*, 12 Allen (Mass.) 107; *Gee* v. *Scott*, 48 Tex. 510; *Cram* v. *Cram*, 33 Vt. 15; *Re Jones*, 6 Biss. (U. S.) 68 (Wisconsin). To the contrary see *Lockhart* v. *Luker*, 36 Miss. 68; but compare *Dunlap* v. *Hearn*, 37 Id. 471.

Another rule of construction of these statutes is, that the witness is not rendered competent, merely because the husband or wife of the witness is a party, and the statutes render parties competent, but that the witness himself, or herself, as the case may be, must be a party in order to get the benefit of the statute: *Barber* v. *Goddard*, 9 Gray (Mass.) 71; *Ray* v. *Smith*, Id. 141; *Blake* v. *Lord*, 16 Id. 387; *White* v. *Stafford*, 38 Barb. (N. Y.) 419; *Carpenter* v. *Moore*, 43 Vt. 392.

III. NOT COMPETENT AGAINST EACH OTHER.—It was well settled at common law that neither party to the marriage could testify *against* the other in any action, civil or criminal: *Kyle* v. *Frost*, 29 Ind. 382; *Carter* v. *Taylor*, 20 La. Ann. 421; *Blain* v. *Patterson*, 47 N. H. 523; *Copous* v. *Kauffman*, 8 Paige (N. Y.) 583; *Erwin* v. *Smaller*, 2 Sandf. (N. Y.) 340; *Edwards* v. *Pitts*, 3 Strobh. (S. C.) 140; even though her husband was unnecessarily made a co-defendant in equity, the wife was not competent for the plaintiff: *Leach* v. *Shelby*, 58 Miss. 681. She could not discredit a joint title in herself and her husband coming to them through her own heirship: *Moody* v. *Fulmer*, 3 Grant Cas. (Pa.) 17; nor could she give testimony the tendency of which was to discredit her husband: *Keaton* v. *McGwier*, 24 Ga. 217; contra, *Ware* v. *State*, 6 Vr. (N. J.) 553. She could not support an action against her husband for the price of her own board: *Burlen* v. *Shannon*, 14 Gray (Mass.) 433; or testify against him in an action against both for the value of labor and materials furnished to herself: *Main* v. *Stephens*, 4 E. D. Sm. (N. Y.) 86; S. P. *Bast* v. *Anspach*, 1 Leg. Gaz. Rep. (Pa.) 25.

On the other hand, the husband was also forbidden to testify

against his wife, even to prove his marriage to her where she sued as a *feme sole: Bently* v. *Cook*, 3 Doug. 442; or to prove that property sought to be replevied from the wife was purchased by him and sold to the plaintiff, in rebuttal of testimony tending to show a gift of the property to the wife: *Stanley* v. *Schultz*, 47 Ind. 217; compare *Davis* v. *Dunwoody*, 4 T. R. 678.

IV. OR FOR EACH OTHER.—Neither was the husband allowed to testify in favor of the wife, or the wife in favor of the husband, in civil or criminal proceedings. If a female defendant pleaded coverture, the alleged husband could not prove his marriage with her: *Woodgate* v. *Potts*, 2 Car. & K. 457. (This was held otherwise in some criminal cases. See *infra*, XVII.) The husband could not testify in behalf of the interest of the wife in her separate estate: *Miller* v. *Williamson*, 5 Md. 219; *Wilson* v. *Sheppard*, 28 Ala. 623; *Dwelly* v. *Dwelly*, 46 Me. 377; *Williamson* v. *Morton*, 2 Md. Ch. 94; *Marsman* v. *Conklin*, 2 C. E. Green (N. J.) 282; *Cramer* v. *Reford*, Id. 367; *Galway* v. *Fullerton*, Id. 389; *Warner* v. *Dyett*, 2 Edw. (N. Y.) 497; and this, even though she was not a party to the record: *Cobb* v. *Edmondson*, 30 Ga. 30; *Harrell* v. *Hammond*, 25 Ind. 104. So, on the trial of a right of property, where the claimant was a *feme covert*, her husband was incompetent in her behalf: *Moore* v. *McKie*, 5 Sm. & M. (Miss.) 238; S. P. *Wall* v. *Nelson*, 3 Litt. (Ky.) 395; *Caperton* v. *Callison*, 1 J. J. Marsh. (Ky.) 397; *Hopkins* v. *Smith*, 7 Id. 263; *Hodges* v. *Branch Bank*, 13 Ala. 455; and so was he where the claimant was a trustee for the wife: *Hall* v. *Dargan*, 4 Ala. 696; S. P. *Wier* v. *Buford*, 8 Ala. 134; and the wife was likewise incompetent to testify in the husband's favor under like circumstances: *Dexter* v. *Parkins*, 22 Ill. 143.

Again, a husband was not a competent witness to a deed conveying land to the wife, and executed during marriage: *Johnston* v. *Slater*, 11 Gratt. (Va.) 321. He could not testify for her even though he had no personal interest whatever in the result of the suit: *Hosack* v. *Rogers*, 8 Paige (N. Y.) 229. Where the wife was a distributee and would gain by setting aside the will, the husband could not testify for the contestant: *Walker* v. *Walker*, 34 Ala. 469; nor could he in such a case, there being no will, testify for the administrator in an action against him: *Gilkey* v. *Peeler*, 22 Tex. 663; or in an action brought by the administrator to

increase the assets of the estate: *Lisman* v. *Early*, 12 Cal. 282. Even where the wife sued to recover damages sustained by her from the intoxication of her husband, caused by the use of liquor sold to him by the defendant, he could not testify in her behalf: *Jackson* v. *Reeves*, 53 Ind. 231; contra, in Illinois: *Noy* v. *Creed*, 1 Ill. App. 557.

The wife was equally debarred from aiding her husband's cause. Both her testimony and her declarations were inadmissible in his behalf: *Karney* v. *Paisley*, 13 Iowa 89. She could not sustain a title granted by her husband by deed of general warranty: *Leach* v. *Fowler*, 22 Ark. 143; or aid him in resisting an attachment suit: *McCollem* v. *White*, 23 Ind. 43; *Boyle* v. *Haughey*, 10 Phila. (Pa.) 98; or in maintaining trespass *de bonis asportatis*: *Hayes* v. *Parmalee*, 79 Ill. 563. She could not, by her declarations made soon after the birth of her child, that it was born alive, support her husband's claim to an estate by the curtesy: *Gardner* v. *Klutts*, 8 Jones L. (N. C.) 375. Her testimony was inadmissible even where he had only a contingent interest in the result of the suit favorable to the party for whom her testimony was offered; *e. g.*, when the husband's fees as attorney depended upon it: *Whitehead* v. *Foley*, 28 Tex. 268. The only case in which she could testify in favor of her husband was where she had acted as his agent, and within the scope of her authority as such agent: *Hardy* v. *Mathews*, 42 Mo. 406; *Mountain* v. *Fisher*, 22 Wis. 93. See *infra*, IX.

The statutory departures from these principles are numerous. Thus, it is now held in some jurisdictions that the husband or wife may testify in favor of the other when the latter is unnecessarily made a party: *Green* v. *Taylor*, 3 Hughes (U. S.) 400; or where both are co-plaintiffs or co-defendants: *Marsh* v. *Potter*, 30 Barb. (N. Y.) 506. Another rule is, to admit either to testify in his or her own behalf only: *Rogers* v. *Rogers*, 46 Ind. 1; or in behalf of the other who is interested but not a party to the record: *Peaslee* v. *McLoon*, 16 Gray (Mass.) 488; *Hastings* v. *McKinley*, 1 E. D. Smith (N. Y.) 273.

The *husband* is held competent to testify in support of his wife's claim to property: *Porter* v. *Allen*, 54 Ga. 623; *Wing* v. *Goodman*, 75 Ill. 159; *Allen* v. *Russell*, 78 Ky. 105; or where the action affects her separate property only: *Snell* v. *Bray*, 56 Wis.

156; or is brought to recover for services rendered by her: *Fowle* v. *Tidd*, 15 Gray (Mass.) 94.

The *wife* is competent for her husband (defendant in execution) on a trial of the right of property: *Hemphill* v. *Townsend*, 7 Ala. 853; or, generally, under the Connecticut statute: *Merriam* v. *Hartford, &c., Rd.*, 20 Conn. 354; (contra, in North Carolina: *Rice* v. *Keith*, 63 N. C. 319); *e. g.*, to corroborate her husband: *Lincoln Avenue, &c., Road Co.* v. *Madans*, 102 Ill. 417; the jury to give her testimony "such credit as under the circumstances they think it entitled to:" *State* v. *Nash*, 10 Iowa 81. She may testify for him when sued by an administrator, she not being a party to the record: *Thompson* v. *Wadleigh*, 48 Me. 66; or when sued in trespass, for breaking and entering and setting fire to plaintiff's barn: *Bucknam* v. *Perkins*, 55 Me. 490. She may aid him in establishing a claim against the estate of a deceased person: *Barry* v. *Sturdivant*, 53 Miss. 490; or testify in favor of his assignee: *Prince* v. *Down*, 2 E. D. Smith (N. Y.) 525: *Farley* v. *Flanagan*, 1 Id. 313. In Pennsylvania, she may testify for, but not against him: *Yeager* v. *Weaver*, 64 Penn. St. 425. Compare *Dellinger's Appeal*, 71 Id. 425. In Wisconsin the rule is that where two or more defendants must rely upon the same defence, so that proof of a good defence as to one establishes a defence as to the other, the wife of one cannot be a witness in behalf of the other, unless the circumstances are such as will permit her to testify directly for her husband. Accordingly, where the issue was whether a conveyance, under which both defendants claimed as grantees, was ever delivered to them by the grantor, it was held that the wife of one defendant (not being herself a party) could not testify for the other: *Stewart* v. *Stewart*, 41 Wis. 624. In an early Massachusetts case, on a note given to the wife before marriage, and endorsed subsequently by her husband, the wife was permitted to testify that the note was paid before the endorsement: *Fitch* v. *Hill*, 11 Mass. 286.

V. OR TO PROVE NON-ACCESS.—The common-law rule, founded on decency, morality and public policy, provides that neither the husband nor the wife, at any time during the continuance of the marriage, or after its determination by death or divorce, shall be allowed to prove non-access during wedlock, *i. e.*, the absence of the fact of sexual intercourse, or of the opportunity of sexual intercourse, whatever may be the form of the legal proceeding in which

such testimony is offered, or whoever may be the parties to it: *R.* v. *Rook*, 1 Wils. 340; *R.* v. *Luffe*, 8 East 193, 203; *R.* v. *Kea*, 11 Id. 132; *Goodright* v. *Moss*, Cowp. 494; *Cope* v. *Cope*, 1 M. & Rob. 269, 274. And the "enabling acts" do not seem to have changed the rule: *Chamberlain* v. *People*, 23 N. Y. 85; *Boykin* v. *Boykin*, 70 N. C. 262. Under it collateral facts could not be shown for the purpose of proving non-access: thus, the husband could not be asked whether, at a particular time, he did not live at a distance from his wife and cohabit with another woman: *R.* v. *Stourton*, 5 Ad. & E. 170. Neither party to the marriage could prove, directly, the illegitimacy of a child born during wedlock: *R.* v. *Mansfield*, 1 Q. B. 444. But in *R.* v. *Stourton*, *supra*, PATTESON, J., said that the parents could bastardize their issue by any evidence except that of non-access. So, also, it is held that the wife may testify to her own adultery, and name her paramour. While she is not permitted to bastardize her own offspring, still the child's illegitimacy having been shown by proper evidence, she is sometimes, from necessity, permitted to testify as to who is the father of the child: *Ratcliffe* v. *Wales*, 1 Hill (N. Y.) 63, 65; *People* v. *Overseers of Ontario*, 15 Barb. (N. Y.) 286; *Parker* v. *Way*, 15 N. H. 45; *Commonwealth* v. *Shepherd*, 6 Binn. (Pa.) 283; *State* v. *Pettaway*, 3 Hawks (N. C.) 623; *R.* v. *Reading*, Cas. t. Hardw. 79, 82; *R.* v. *Luffe*, 8 East 193. But the mother of a child begotten before, but born after marriage, could not testify that her husband was not its father: *Dennison* v. *Page*, 29 Penn. St. 420; *R.* v. *Mansfield*, 1 Q. B. 444. That she can testify *in favor* of legitimacy, see *Mosely* v. *Eakin*, 15 Rich. (S. C.) 324. See, also, *Cooke* v. *Lloyd*, Peake Ev. App. xxviii.

When the controversy is between third persons, there are cases which hold the husband and wife competent to testify as to the time of their marriage, the fact of access, the date of the birth of a child, and any other independent facts affecting the question of legitimacy: *Standen* v. *Standen*, Peake's Cas. 32; *R.* v. *Bramley*, 6 T. R. 330; *Parker* v. *Way*, 15 N. H. 45; *Corson* v. *Corson*, 44 Id. 587; *Page* v. *Dennison*, 1 Grant Cas. (Pa.) 377; *Leaphart* v. *Leaphart*, 1 S. C. 199; but in these cases, for the most part, the evidence was admitted *ex necessitate*. See, also, *Raynham* v. *Canton*, 3 Pick. (Mass.) 293; *Shaak's Estate*, 4 Brewst. (Pa.) 305.

VI. PROVING THE MARRIAGE—ITS DURATION IMMATERIAL.

(1.) *Proving the marriage.*—Sometimes, where the competency

of a witness is questioned on the ground of marriage to a party or person interested, the *factum* of the marriage is disputed, and such marriage must be proved, to exclude the witness, or disproved, to admit him. The presumption arising from cohabitation is not enough to exclude the witness: *Hill* v. *State*, 41 Ga. 484; although presumptive proof of the marriage has been considered sufficient to render the wife an incompetent witness against the husband to disprove the marriage: *Scherpf* v. *Szadeczky*, 4 E. D. Smith (N. Y.) 110; *Rose* v. *Niles*, 1 Abb. Adm. 411.

Generally, the husband or wife is competent to prove the marriage, so as to render the other an incompetent witness: *Dixon* v. *People*, 18 Mich. 84; or to sustain the objection that the plaintiff was a married woman suing without her husband or any next friend: *Willis* v. *Underhill*, 6 How. Pr. (N. Y.) 396; contra, *Bentley* v. *Cook*, 3 Doug. 442. So, also, the wife is a competent witness, in behalf of her children, to prove the marriage between herself and her husband: *Christy* v. *Clarke*, 45 Barb. (N. Y.) 529. But a woman who claimed to be the widow of an intestate, and as such entitled to letters on his estate, was held incompetent to establish the *factum* of her marriage with the deceased: *Redgrave* v. *Redgrave*, 38 Md. 93; compare *Fitzsimmons* v. *Southwick*, 38 Vt. 509. Otherwise held, where the *legality* of her marriage with the deceased was the only question in issue: *Greenawalt* v. *McEnelley*, 85 Penn. St. 352.

The marriage must be a lawful one to exclude the parties to it. Lover and mistress are not incompetent witnesses by reason of the fact of their immoral cohabitation: *Bathews* v. *Galindo*, 4 Bing. 610; *Flanagin* v. *State*, 25 Ark. 92; *Dennis* v. *Crittenden*, 42 N. Y. 542. Where the validity of the marriage is in doubt the witness is generally rejected: *Peats's Case*, 2 Lew. C. C. 288; *Wakefield's Case*, Id. 279; *Campbell* v. *Tremlow*, 1 Price 81, 88, 90, 91. See, also, *Divoll* v. *Leadbetter*, 4 Pick. (Mass.) 220. The fact that the parties, in good faith, believe their marriage to be valid, does not make it so; and, its invalidity being shown, each becomes a competent witness for all purposes, even the disclosure of facts communicated by one to the other during the period they lived together, honestly supposing their relation to be that of husband and wife: *Wells* v. *Fletcher*, 2 Car. & P. 12; *Wells* v. *Fisher*, 1 M. & Rob. 99, and note. In Utah the statute excludes the wife, except where the action is between herself and her husband. A

witness was offered by a party to the suit on trial, with the statement that "she is his plural or second wife." It was held that such witness should be excluded, and the court would not try the question of the validity of the marriage, or the relations of the parties: *Friel* v. *Wood*, 1 Utah T. 160; but compare *Miles* v. *United States*, 103 U. S. 304; s. c. 2 Crim. L. Mag. 489, reversing 2 Utah T. 19.

(2.) *Its duration immaterial.*—At what period the marital relation had its inception is of no importance on the question of the competency of either party to that relation as a witness for or against the other. Where one party married a witness already subpœnaed by his opponent to testify on the approaching trial, she was excluded: *Pedley* v. *Wellesley*, 3 Car. & P. 558. Nor does it matter that the relation has been ended by death or judicial decree. See *infra*, XI., XII., XIII. In such an event, the Supreme Court of the United States has said: "It is true the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule:" McLEAN, J., in *Stein* v. *Bowman*, 13 Pet. (U. S.) 209. See, also, *Patton* v. *Wilson*, 2 Lea (Tenn.) 101. Even where the cause of action accrued to the wife before marriage, the husband was rejected as a witness: *Collins* v. *Mack*, 31 Ark. 684; contra, *Perry* v. *Whitney*, 30 Vt. 390. Nor could the wife testify in such cases, the husband being a party: *Smith* v. *Boston, &c., Rd.*, 44 N. H. 334; *Donnelly* v. *Smith*, 7 R. I. 12.

VII. LIMITS AND EXCEPTIONS TO THE RULE.—The rule we are examining, like all other general regulations of the common law, is subject to numerous exceptions, so called, most of them, however, being more seeming than real. Bearing in mind the object of the rule—to secure the confidence of private life and prevent discord in families—and that it only forbade the parties to the marriage to enter the witness-box for the purpose of testifying for or against one another, we readily see that in cases where one of the parties to the marriage was a competent witness at common law, the other was also competent; and so it was held: *Wilson* v. *People*, 5 Park. (N. Y.) 119; *Seigling* v. *Main*, 1 McMull. (S. C.) 252; *Abbott* v. *Clark*, 19 Vt. 444. But the wife may be competent where the husband is not, *e. g.*, where he has been convicted of felony or perjury: *State* v. *Anthony*, 1 McCord (S. C.) 285.

Again, where the wife had no interest in the suit, the husband was admitted as a witness, and *vice versa*: *Meni* v. *Rathbone*, 21 Ind. 454; *Howell* v. *Zerbee*, 26 Id. 214; *Mitchell* v. *Clagett*, 9 Md. 42; *Hall* v. *Murphy*, 14 Tex. 637; *Robinson* v. *Hutchinson*, 31 Vt. 443. Thus, where a complaint shows the cause of action to be wholly in the husband, he is a competent witness in his own behalf, although the wife may be joined as a plaintiff: *Lockwood* v. *Joab*, 27 Ind. 423. And in some cases one spouse was deemed competent where the other was not made a party, and for that reason: *Deck* v. *Johnson*, 30 Barb. (N. Y.) 283; *Leavitt* v. *Bangor*, 41 Me. 458; *Bonett* v. *Stowell*, 37 Vt. 258. In one case found, the admission of the husband's testimony, against the objection of the wife, was held not to be error, because "he testified to nothing untrue or prejudicial to her interest:" *Wade* v. *Powell*, 31 Ga. 1; see, also, *R. & B. Rd. Co.* v. *Lincoln*, 29 Vt. 206. The fact that his testimony tends to increase a fund held in trust for his wife, will not exclude him, his interest being contingent: *Dyer* v. *Homer*, 22 Pick. (Mass.) 253; see, also, *Sneckner* v. *Taylor*, 1 Redf. (N. Y.) 427; *Peiffer* v. Lytle, 58 Penn. St. 386; *Rose* v. *Blair*, 1 Meigs (Tenn.) 525.

Again, the wife can be a witness to testify as to the contents of a lost trunk, the property of her husband: *Illinois, &c., Rd. Co.* v. *Taylor*, 24 Ill. 323; *Same* v. *Copeland*, Id. 332; *Sassen* v. *Clark*, 37 Ga. 242; *McGill* v. *Rowand*, 3 Penn. St. 451. And so may she in a joint suit to recover her separate property: *Gee* v. *Lewis*, 20 Ind. 149. Some cases admit the witness, because it appears that he or she, as the case may be, has no interest in the event, thus putting as the ground of incompetency *interest* only: *Jackson* v. *Baird*, 4 Johns. (N. Y.) 230; *Town* v. *Needham*, 3 Paige (N. Y.) 546. Where the testimony related solely to a defence peculiar to the witness, it was admitted, and the witness allowed to testify in his or her own behalf only, and not in behalf of the other spouse: *Klenk* v. *Knoble*, 37 Ark. 298; *Call* v. *Byram*, 37 Ind. 499.

VIII. COLLATERAL PROCEEDINGS.—While it was an inflexible rule that neither husband nor wife should be permitted to testify against the other, where either was directly and immediately interested in the event of the action or proceeding, whether civil or criminal, yet, in collateral proceedings not immediately affecting their mutual interest, their testimony was receivable, even though

the testimony of one tended to contradict that of the other, or might subject the other to a legal demand, or even to a criminal prosecution: *Commonwealth* v. *Reid*, 8 Phila. (Pa.) 385; s. c., 1 Pa. Leg. Gaz. Rep. 182, where the cases are fully discussed. But it is the privilege of the witness to decline to testify to such matters as will criminate the other party to the marriage.

In a comparatively early English case the rule was laid down that a husband or wife ought not to be permitted to give any evidence that may even tend to criminate the other; *King* v. *Inhab. of Cliviger*, 2 T. R. 263. This rule was much discussed in two subsequent cases in the Court of King's Bench (*King* v. *Inhab. of All Saints*, 6 Mau. & Sel. 194, and *King* v. *Inhab. of Bathwick*, 2 Barn. & Ad. 639, 647), the court, after much argument, deciding that the rule must be restricted. Lord ELLENBOROUGH remarked that the rule was laid down "somewhat too largely." In *King* v. *Bathwick*, where, the question being a female pauper's settlement, a man had been called to prove his marriage to her, another woman was held a competent witness to prove her own previous marriage with the same man; for although, if the testimony of both witnesses were true, the husband had been guilty of bigamy, yet neither the testimony given, nor any decision of the trial court founded on that testimony, could thereafter be received in evidence to support an indictment against him for that crime; it being altogether *res inter alios acta*, and neither the husband nor the wife having any interest in the decision of the question. In the opinion, the court said that the rule laid down in *King* v. *Cligiver* "is undoubtedly true in the case of a *direct* charge and proceeding against him for any offence," but denied its correctness when applied to collateral matters. See, also, *Fitch* v. *Hill*, 11 Mass. 287; *Baring* v. *Reeder*, 1 Hen. & M. (Va.) 154, which decisions are commented on by Chief Justice PARKER, of Massachusetts, as follows: "They establish this principle, that the wife may be a witness to excuse a party sued for a supposed liability, although the effect of her testimony is to charge her husband upon the same debt, in an action afterwards to be brought against him. And the reason is, that the verdict in the action in which she testifies, cannot be used in the action against her husband; so that, although her testimony goes to show that he is chargeable, yet he cannot be prejudiced by it. And it may be observed, that, in these very cases, the husband himself would be a competent witness, if he

were willing to testify, for his evidence would be a confession against himself:" *Griffin* v. *Brown*, 2 Pick. (Mass.) 308. See, also, *Vowles* v. *Young*, 13 Ves. 144; *Williams* v. *Johnson*, 1 Str. 504, and *Henman* v. *Dickinson*, 5 Bing. 183, where, the suit being by indorsee against acceptor, and the defence fraudulent alteration by drawer after acceptance, the wife of the drawer was allowed to prove such alteration.

STEWART REPALJE.

(*To be continued.*)

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## THE EFFECT OF A RECENT DECISION ON THE LAW OF MARINE INSURANCE.[1]

IN *The Phœnix Insurance Co.* v. *The Erie and Western Transportation Co.*, 117 U. S. 213, it was held (BRADLEY, J., dissenting,) that (1) a carrier can lawfully contract with the shipper by his bill of lading "in case of liability to have the full benefit of any insurance that may have been effected upon or on account of said goods." (2) The insurer paying the loss is deprived of the right to sue the carrier by whose negligence the cargo was lost.

The result in this case of the decision by a court of such importance as the Supreme Court of the United States on the right of a shipper to agree with his carrier to give the latter the benefit of the separate contract of the former with a third party (the insurer) would excite surprise if it was not also the conclusion of other respectable courts on the same subject.

It points out very clearly that a different train of thought is excited in the minds of underwriters and their adjusters from that of the judiciary by the presentation of the same facts; which is right and which is wrong is immaterial, for the law is on the side of the courts, even if the weight of reason is the other way. The minds of lawyers are submissive to authority and not critical. It will not, however, be thought captious to point out what other conclusions must follow from this ruling.

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[1] This article was received too late to append it as a note to the case to which it relates, which is reported in the May number (*ante*, p. 330), and which will also appear in 117 U. S. Reports 213. The article contains the dissenting opinion of Mr. Justice BRADLEY, hitherto unpublished.